WILMORE MADZINGIRA

Versus

PROVINCIAL MAGISTRATE I. MHENE N.O

And

FARAI CHIMOMBE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 6 July 2022 & 8 March 2023

Opposed review application

T. Zhuwarara for applicant
M.Tarugarira for second respondent
No appearance for first respondent

CHILIMBE J

THE REVIEW APPLICATION

[1] The underlying issue in the review application before me relates to a blocked thoroughfare in a farming location. Applicant fenced off an unnamed road off thus triggering an unresolved dispute with second respondent. The second respondent approached the magistrate`s court at Marondera and obtained an order from first respondent directing applicant to restore free passage.

[2] Applicant now seeks the review of the proceedings before first respondent on the basis that his decision was (a) grossly irregular, illegal and irrational and (b), not based on any evidence and therefore (c) amounted to a misdirection.

[3] For these reasons, applicant seeks the setting aside of the proceedings and the remittance of the matter for a re-hearing before a different magistrate.

BACKGROUND

[4] Applicant ("Mr. Madzingira") and first respondent ("Mr. Chimombe") are beneficiaries of the Zimbabwean Land Reform Programme. They were each allocated pieces of land ("plots") on Warwick Farm in the Marondera area around the year 2000. Mr. Madzingira occupies Plot Number 12 and Mr. Chimombe Plot 8.

[5] The site plan of the farm plots that was admitted as evidence depicts the following layout. Mr. Madzingira` s plot lies due west and is separated by a block of 12 other plots from Mr. Chimombe` s lying to the east. The 12 plots in-between comprise of plots 21 to 29 lying back-to-back with plots 27 to 31.I. Tracing a course that follows the common boundaries between these 12 back-to-back plots is the road in question. This road splits into a fork upon reaching Mr. Madzingira' s plot. One leg forms the controversial stretch which takes the northern link, whilst the other takes the southern route-almost parallel to the northern one.

[6] Mr. Madzingira indicated in his papers both before this court and the court *a quo* that both legs of the road passed through his property. Sojourners had a choice of which route to take. Since the northern leg was interfering with his farming operations so he proceeded to fence it off sometime in 2017.

THE COURT *A QUO*`S FINDINGS

[7] Mr. Chimombe approached the court a quo *ex parte* and obtained an interim interdict directing Mr. Madzingira to remove the barrier that he had erected across the road. This order was subsequently confirmed on return.

[8] In issuing the permanent interdict, the court based its conclusions on findings on facts established before it, viewed against the requirements of an interdict as defined in the classic case of *Setlogelo v Setlogelo* 1914 AD 221.The court *a quo* also relied on a letter written by Mr. Wilson Muchenje, the Acting District Lands Officer, Marondera ,which confirmed the existence of the access road as marked on the site plan .The court went further and conducted an inspection in loco of the area. The court satisfied itself from the indications of Mr, Muchenje in loco, that Mr. Madzingira had indeed improperly fenced off the road.

[9] By fencing off the road, Mr. Madzingira deprived other plot holders, Mr. Chimombe included, of their rights of access. This evidence and conclusion were accepted by the court. The court also reasoned that Mr. Chimombe had no other recourse. And so, the application for an interdict was duly granted.

THE GROUNDS FOR REVIEW

[10] A point *in limine* was raised on behalf of the second respondent Mr. Chimombe but was, on agreement, taken together with the merits in argument. It was argued that the application for review was defective by its failure to set out the grounds and relief prayed for as required

by Order 33 Rule 257 of the old High Court Rules 1971. I was referred to D*andazi v Wankie Colliery Co LTD 2001 (2) ZLR 298, Chataura v Zimbabwe Electricity Supply Authority* 2001 (1) ZLR (H); *Minister of Labour & Ors v Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) and *Drynan v Magistrate Kuture & Anor* HMT 45-19, in support of that argument by Ms *Tarugarira* for the second respondent.

[11] The essence of these authorities is that the grounds of review and relief sought must be stated clearly in the application. It was contended by Ms *Tarugarira* that the grounds and basis of the present application betrayed an appeal disguised as a review application.

[12] The face of the application, as read specifically with paragraph 12 of the founding affidavit clearly sets out the complaint against the proceedings in the court *a quo*. Faced with a similar point *in limine*, this court per NDOU J in *Golden Moyo v Stephen Mkoba & 4 Ors* HB [13] did not detain itself on that point.

[13] The reason being that the grounds of review were in that matter, apparent in the application. Likewise, there is no basis to sustain the objection herein-the papers do bear the grounds of review and relief thereof. This in addition to the position laid down by the Supreme Court in *Gwaradzimba NO v Gurta AG* 2015 (1) ZLR 402 to the effect that what matters is essentially the essence and completeness of the review application.

THE LAW

[14] The established position at law is that only those defects that are substantially inimical to the interests of justice will warrant interreference by a superior court in the proceedings of a lower court.

[15] The above position was summed up in *Dombodzvuku & Anor v Sithole & Anor* 2004 (2) 242 per MAKARAU J (as she then was). This court reiterated that "*an incorrect rendition of the law*" alone may not justify interference, by a reviewing court, with the proceedings of a lower court. Where the lower court demonstrably engages, and logically processes the issues and arguments presented before it, a wrong conclusion at law may not necessarily render the proceedings invalid. The learned judge held at 234 A-C, that; -

> "As observed in *Oskil Properties* v *Chairman, Rent Control Board* 1985 (2) SA 234 (SEC), the onus resting upon a litigant seeking to set aside the exercise of a discretion on grounds of unreasonableness is considerable. In my view, the task is Herculean if it is an interpretation of the law by a judicial officer that is sought to be impugned as being

> unreasonable. An incorrect rendition of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. The person attacking it must go further and show that on the facts before the court, the decision reached defies all logic and is completely wrong. A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable. As Garwe J as he then was observed in *Zambezi Proteins (Pvt) Ltd & Ors* v *Minister of Environment & Tourism & Anor* 1996 (1) ZLR 378 (H), **not every mistaken exercise of judgment is unreasonable and not every reasonable exercise of judgment is right.** In my view, there is nothing irregular in the decision by the first respondent that may compel me to use my review powers at this stage of the proceedings. The decision by the first respondent was arrived at after hearing argument from both counsel and it was a carefully considered decision." [Underlined for emphasis].

DID THE COURT *A QUO* CORRECTLY INDENTIFY THE EXISTENCE OF RIGHTS PRE-REQUISITE TO ISSUANCE OF AN INTERDICT?

[16] On the basis of such guidance, I now advert to the arguments raised in the present matter. As stated, the core issue related to rights of passage on a road passing through farming plots in a rural/farming locality. Mr. *Zhuwarara,* for applicant, argued that the court *a quo* erred at law by resolving the dispute through the common law remedy of an interdict. The correct remedies lay in statutory or administrative facilities described as follows; -

[17] Firstly, it was argued that the access road constituted a servitude over Mr. Madzingira` s land. In fact, Mr. Chimombe, who was applicant in the court *a quo*, referred to the road as such in his founding affidavit. For that reason, section 52 of the Land Commission Act [*Chapter 20:29*] provided for the exercise of rights to such servitudes. As such, the court *a quo* ought to have been properly guided by the procedure laid out in that section in disposing of the application before it.

[18] Secondly, counsel argued that the Roads Act *[Chapter 13:18]* governed resolution of disputes regarding access roads. The relevant provisions thereof being found under Part VI of that Act which dealt with the declaration, diversion and closure of roads, among other matters. Ms *Tarugarira*` s response to that argument was simple. Once a piece of land was acquired (as in the case of Warwick Farm) under the Land Acquisition Act *[Chapter 20:10]*, Part III of that Act superseded the provisions of both the Roads Act and Lands Commission Act relating to roads and servitudes.

[19] In that respect, counsel argued that the demarcation/depiction of roads and servitudes, shown on a map of the type produced in the court *a quo* sufficed for the purposes of establishing Mr. Chimombe` s rights. Moreso where that map was produced, interpreted and endorsed as correct by the Acting Lands Officer Mr. Wilson Muchenje; the lawful authority or "designated officer" in terms of section 2 of the Land Acquisition Act.

[20] I will start with the last point. Section 5 (1) of the Land Acquisition Act describes such map as referred to by Ms *Tarugarira* as follows provides thus; -

5 Preliminary notice of compulsory acquisition

> (1) Where an acquiring authority intends to acquire any land otherwise than by agreement, he shall—
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> (*a*) publish once in the *Gazette* and once a week for two consecutive weeks, commencing with the day on which the notice in the *Gazette* is published, in a newspaper circulating in the area in which the land to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the notice to the attention of the owner, a preliminary notice—
>
> (i) describing the nature and extent of the land which he intends to acquire and stating that a plan or map of such land is available for inspection at a specified place and at specified times; and
>
> (iii) calling upon the owner or occupier or any other person having an interest or right in the land who—
>
> A. wishes to contest the acquisition of the land, to lodge a written objection with the acquiring authority within thirty days from the date of publication of the notice in the *Gazette*; or
>
> B. wishes to claim compensation in terms of Part V for the acquisition of the land, to submit a claim in terms of section *twenty-two*, where the land is not specially Gazetted land; and
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> (*b*) serve on the owner of the land to be acquired and the holder of any other registered real right in that land whose whereabouts are ascertainable after diligent inquiry at the Deeds Registry and, if necessary, in the appropriate companies register, notice in writing providing for the matters referred to in subparagraphs (i), (ii) and (iii) of paragraph (*a*):

> Provided that in respect of specially Gazetted land the publication of a preliminary notice in the *Gazette* and once a week for two consecutive weeks (commencing on the day on which the notice in the *Gazette* is published) in a newspaper circulating in the area in which the land to be acquired is situated, shall be deemed to constitute service of notice in writing on the owner of the land to be acquired and the holder of any other registered real right in that land.

[21] It is clear from the above section that reference to the site plan or map herein is for purposes other than those suggested by counsel. Similarly, a perusal of the rest of Part III of the Land Acquisition Act discloses that generally, the Act provides for the rights of the relinquishing and acquiring owners. Even section 8 which provides for the transfer or savings of various rights attached to the land is principally concerned with the hand-over-take-over of the land. The present dispute is between the recipients of the acquiring authority`s beneficence.

[22] This brings me to section 52 of the Land Commissions Act which Mr. *Zhuwarara* argued was applicable. That section proclaims as follows; -

> **52 Registration of certain pre-existing servitudes or agreements for servitudes concluded before commencement of this Act**
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> If a designated officer is satisfied that there subsists on or over any land in the area for which he or she is responsible—
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> (*a*) a Pre-existing servitude that the lawful holders or occupiers of the land subject to the servitude are aware of, and that the holders or occupiers concerned have been exercising the rights and obligations deriving from, the servitude before the commencement of this Act; or
>
> (*b*) any rights or obligations in the nature of a servitude which, before the commencement of this Act, had been agreed between the lawful holders or occupiers of the land subject to the agreement, whether or not such agreement was brokered by any officer of the Ministry, and whether or not such agreement has been reduced to writing; then the designated officer shall, notwithstanding anything in section 45 and 46, act in terms of section 46(4), (5), (6) and (7) to create the statutory servitude embodying the pre-existing servitude or the agreement referred to in paragraph (*b*) as if there is no dispute about the creation of a statutory servitude or about any compensation to be payable therefor.

DOMESTIC REMEDIES

[23] Mr. *Zhuwarara`s* argument was more on point. Between the Roads Act and Land Commission Act lay statutory or administrative remedies that both parties could have resorted to. There was (a) no need for Mr. Madzingira to fence off the road nor (b) Mr. Chimombe filing an application for an interdict. Especially given that no credible fact or argument was presented to confirm that there was no other suitable remedy.

[24] Courts have always recognised the need to fully exploit the efficacy and readiness of statutory/administrative facilities in the resolution of disputes. GOWORA J (as she then was) stated so in *Francis Rateiwa v Kambuzuma Housing Cooperative & Anor* 2007 (1) ZLR 311where she held [at 316 C] that; -

> "In deciding whether or not the court should withhold its jurisdiction and insist that a litigant first exhaust the domestic remedies provided for a court has to have regard to a number of factors. Amongst these are ***[1]*** the subject matter of the statute***,[2]*** the body of persons who make the initial decision and ***[3]*** the bases on which it is to be made, ***[4]*** the body of persons who exercise appellate jurisdiction and ***[5]*** the manner in which that jurisdiction is to be exercised including the ambit of any rehearing on appeal, ***[6]*** the powers of the appellate tribunal, including its power to redress or cure the wrongs of a reviewable character, and ***[7]*** whether the tribunal, its procedures and powers are suited to redress the particular wrong of which the applicant complains." [annotations inserted].

[25] The considerations annotated by the enumerations in the above passage are fully addressed by the Roads Act as well as the Lands Commission Act. Part IV of the Roads Act in particular deals with the exercise of rights regarding access, closure, opening or designation of roads. The Roads Authority established in terms of that Act, together with the Minister responsible for administration of the Act have statutory authority to receive, process, adjudicate and decide applications for, or disputes over the exercise of such rights. In the same respect, the Lands Commission creates a facility by sections 50 and 51, an opportunity for the ventilation and exercise of the same rights.

[26] The court *a quo* made a finding that not only did a road exist but proceeded to conclude on the applicable rights enjoyed by the two parties. The court further concluded that Mr. Madzingira had improperly closed the road. This was not a task reposed in the court. In order to ascertain these facts, the court *a quo* employed its discretion and conducted an inspection

in loco. Firstly, the court did not record that the evidence before it from both sides of the dispute was so deficient as to warrant supplement via an inspection.

[27] Secondly, the court *a quo* was seized with a court application governed by Order 22 Rule 5 (a) to (c) and Order 22 Rule 9 (1) to (3) of the Magistrate`s Court (Civil) Rules SI 11-19). It is presumed (because the record is silent) that the court proceeded in terms of Order 22 Rule 9 (1) which provides that *"At the hearing of the application the court may receive evidence viva voce."*

[28] Thirdly, the court was strongly persuaded by Mr. Muchenje in his capacity as the Acting Lands Officer. Mr. Muchenje was in fact a "designated officer" in terms of section 2 of the Land Commission Act and exercised certain authority. But it becomes immediately clear that he was not acting in terms of the above section-or indeed any other provision relating to servitudes or rights of access in terms of the Act when he made indications before the court at the inspection in loco.

[29] All that against the fact that the court was not at all alive to the administrative procedures that ought to have taken precedence. Indeed, there is no way that the court a quo would have correctly concluded the issue of an alternative remedy without considering the said administrative procedures. At the most, the court could have issued a temporary interdict pending resolution of the matter by the relevant authorities. In the end, not only did the court`s approach led to an incorrect rendition of the parties` rights, it caused a subversion of the statutory procedure established to resolve the exercise of the parties` rights.

DISPOSITION

[30] The misdirection by the court *a quo* was substantial. It resulted in the improper investment of rights into an underserving party. This to the exclusion of inclusive and rational processes to carefully ascertain whether or not such rights were lawful or deserved. As matters stand, considerable animosity was generated between Messrs Madzingira and Chimombe.Harsh and unkind were the words exchanged between the two; -not just at each other-but toward their respective wives.

[31] The very reason why a neutral third party in the form of informed administrative authority ought to have adjudicated over the matter. The very reason too, that either party should, upon conclusion of these proceedings, resort to the appropriate administrative authority for assistance in asserting his rights. This court cannot issue an order referring the

matter to the Magistrate as prayed, nor for the attention of a specific administrative authority. The reason being that each of the parties enjoy a compendium of various rights, and it is up to them to proceed, should they be so advised, to seek the exercise of such rights.

[32] I further take into account that Mr. Madzingira himself triggered the entire episode by taking matters into his hands in fencing off the road. These two gentlemen are also fellow farmers and neighbours who are better off reconciled than anything else. To that extent, I believe it will be apt to let each party bear his burden of legal costs.

It is therefore ordered that; -

1. The proceedings in the court *a quo* under case number Marondera B13/17 be and are hereby set aside.
2. The decision in the court *a quo* be and is hereby set aside and replaced by the following;
    a) The application be and is hereby dismissed and the provisional order be and is hereby discharged with no order as to costs.
3. Each party to bear his own costs incurred herein.

Tabana & Marwa -applicant`s legal practitioners
Laita & Partners- second respondent`s legal practitioners.

CHILIMBE J_____ [08/03/23]